IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CITY OF SEATTLE, Respondent, v. ADAM PETRO, Appellant.	)	No. 62372-9-I UNPUBLISHED OPINION FILED: March 22, 2010

Schindler, C.J. — A jury convicted Adam Petro of four counts of animal cruelty in violation of Seattle Municipal Code (SMC) 9.25.081(F). Petro appeals his convictions, arguing that SMC 9.25.081(F) is unconstitutionally vague because it does not sufficiently define the proscribed conduct or include standards to prevent arbitrary enforcement. In the alternative, Petro contends insufficient evidence supports the convictions. As applied to the facts of this case, we reject Petro's vagueness challenge to SMC 9.25.081(F). And because sufficient evidence supports the convictions, we affirm.

FACTS

On July 23, 2005, Seattle Animal Control Officer James Jackson responded to a citizen complaint about a number of dogs in a van that was parked in an alley at 5947 41st Avenue SW. It was a very hot day and the citizen was concerned about the

well-being of the dogs. Officer Jackson talked to the owner of the dogs, Adam Petro. Petro told Officer Jackson that his house had burned down and he was temporarily keeping the eight dogs in his van while he was living at his partner's sister's house.

Petro allowed Officer Jackson to look inside the van to check on the welfare of the dogs. Officer Jackson testified that six dogs were housed in five crates of various sizes and two dogs were on tethers. Two of the dogs in the crates were over 70 pounds, the other four were medium-sized dogs between 40 and 50 pounds. One dog was housed in an undersized crate and two other dogs were housed together in a single crate. Officer Jackson said that he told Petro that two of the crates he was using were too small for the dogs.

> For the majority, they had some room. Some were a lot larger than others. For a temporary fix it would have been okay. There were some that were really borderline, maybe one crate – one crate there was really borderline, and then the – plus the dog – the [crate] that had the two [dogs] definitely was a – didn't meet specifications.

Officer Jackson told Petro there were free crates available at the City's animal shelter. Officer Jackson also told Petro that he had three days to replace the two crates and 30 days to relocate the dogs.

On October 21, Animal Control Officer David Goldberg responded to a citizen complaint about the welfare of dogs in a van at the same address. Petro was not at the home. Officer Goldberg was able to see through the windows of the van. Officer Goldberg said there were seven dogs in crates with not much room to move around. Officer Goldberg also saw what looked like piles of feces.

On November 21, Animal Control Officer Marcy Beyer returned to check on the

welfare of the dogs. The dogs had been moved to a camping trailer located in the backyard of the house. The trailer was about four feet wide by eight feet long. From the alley, Officer Beyer could see two dogs tethered to the trailer and heard other dogs barking from inside the trailer. There were piles of dog feces in the front of the trailer. Petro was not at home. The homeowner would not allow Officer Beyer to check on the welfare of the dogs.

When Petro called the next day, Officer Beyer asked whether he was still housing the dogs in the crates. Petro said that he kept the dogs in the crates while he was at work and at night. Officer Beyer told Petro that only three dogs were allowed in the City and "I informed him that if we – if he did not find a way to correct the housing that his dogs were in that we would be reporting him to the Zoning Department and they would be enforcing the limit on the number of animals on the property." Officer Beyer suggested tethering the dogs and told Petro that free doghouses were available at the City Animal Shelter.

When Officer Beyer returned on December 13, the dogs were inside the trailer barking. Later, when Officer Beyer talked to Petro, he admitted that the dogs were confined in the crates "from 6:00 in the morning until 2 o'clock in the afternoon when he's at work, and then they came out, and then they go back into the crates from 7:00 p.m. until the morning." Petro told Officer Beyer that he planned to install a fence and house the dogs in doghouses.

On December 30, Petro met with Seattle Humane Law Enforcement Officer Rachel Leahy at the house so she could check on the welfare of the dogs. Officer

Leahy testified that two dogs were chained to the trailer and that five other dogs were housed in crates inside the trailer. There was not much space inside the trailer. Officer Leahy said, "[i]t was a narrow path of maybe couple of feet by 4 feet that you could actually walk in. There wasn't an awful lot of room in there." Although the crates had been cleaned, the smell of feces and urine inside the trailer was "pretty overwhelming." One of the dogs was in an undersized crate that prevented the dog from standing up and two other dogs were still housed together in a crate designed for one dog. Officer Leahy told Petro the two crates were too small for the three dogs. Petro admitted that housing the dogs in the crates "was not a good way to keep the dogs."

> [W]e spoke an awful lot on the condition of the dogs and why they were being kept like that, and we had numerous conversations on this. Adam Petro had expressed to me the fact that prior to this that they had been indoor dogs with him and that he at this stage was just planning on keeping them there as a short-term situation. He was aware that this was not a good way to keep the dogs, and we discussed this, because there was basically no room for the dogs to move in there. This is not a good long-term situation for them. He assured me several times that this was not going to be a long-term situation. He realized that this wasn't good for the dogs and that he was trying to change the accommodation for them.

When Officer Leahy went to check on the welfare of the dogs on January 6, 2006, the housing conditions had not changed. Petro told Officer Leahy that he was buying a house and planned to move by the end of February.

Without prior notice, Officer Leahy went to check on the welfare of the dogs on April 13. The dogs were inside the crates in the trailer. There were piles of feces inside the crates and on the floor of the trailer. The trailer was inadequately ventilated

and the smell of feces and urine was "overwhelming." Officer Leahy told Petro the housing conditions for the dogs were unacceptable.

> I basically warned him that we would be writing up a warrant. The conditions were unacceptable. Nothing had changed. He had already told me that the dogs would be gone by February 28th. We had already discussed in depth numerous times the fact that this was not adequate housing for these dogs, that they didn't have any room to move, that they didn't have any room to stretch out, that basically they couldn't be confined like this between 20 and 22 hours a day, that this just was not healthy for them. We had gone over this on numerous occasions. He said to me that he understood that, that he knew that this was not an ideal situation for them, that he was trying to change it. I informed him at that time that we would be writing up a warrant to remove the dogs because I could not in all fairness leave these dogs like this. They had already been like this for 10 months and that this could not go on through the summer.

When Officer Leahy returned on April 24 to check on the dogs, nothing had changed. Officer Leahy talked to Petro the next day. Petro told Officer Leahy that beginning that week, he planned to take the dogs to a friend's property in Renton during the day, and the dogs would only be in the crates at night.

Officer Leahy went to check on the dogs the afternoon of April 27, May 4, May 5, and May 8. Each time, she heard the dogs barking from inside the trailer.

On May 10, Officer Leahy returned with a warrant to seize the dogs. Two dogs were tethered to the trailer, and the other five dogs were housed in crates inside the trailer. One dog was still housed in the undersized crate and the two other dogs were still housed in a single crate. Officer Leahy took photographs and impounded the dogs.

Veterinarian Andrea Morris examined the dogs at the animal shelter. The dogs

smelled strongly of feces and urine, but were otherwise healthy.

The City of Seattle charged Petro with four counts of animal cruelty. The City alleged on or about April 13, 2006, April 24, 2006, May 8, 2006, and May 10, 2006, Petro violated SMC 9.25.081(F) by:

> [K]nowingly tethering or confining any animal in such a manner or in such a place as to cause injury or pain or to endanger the animal, or keeping an animal in quarters that are injurious to the animal due to inadequate protection from heat or cold, or that are of insufficient size to permit the animal to move about freely.

Officer Jackson, Officer Goldberg, Officer Beyer, and Officer Leahy testified at trial on behalf of the City. The May 10 photographs were admitted into evidence.[1] The City stipulated that the dogs were physically healthy.

Petro testified that although he was not happy with the circumstances, he took steps to make sure the dogs were healthy. Petro claimed that he took the dogs to exercise in Renton as many days as he could. Petro asserted that the dogs were not in the trailer on all the days that Officer Leahy heard the dogs barking.

Petro's partner Virginia Lewis testified that the dogs were never allowed in the house. Lewis and Penny Ratliff, the owner of the house, testified that the dogs were regularly exercised in the morning and evening and the crates were kept clean. According to Lewis and Ratliff, Petro and Lewis took the dogs to Renton at least two days a week.

On direct, Dr. Morris testified that confining a dog in a kennel does not necessarily cause physical injury. However, Dr. Morris said that the longer a dog is

[1] The parties did not designate the photographs as part of the record on appeal.

confined in a crate, the more likely the dog would suffer psychological problems.

> Q. And if an animal is confined in a shelter where they can't stand up all the way, what – what kind of physical problems can result from that?
>
> A. Aside from, say, psychological problems or . . . it's – I don't know if they would necessarily exhibit any physical symptoms. But, you know, animals are supposed to have enough room to stand up and turn around.

On cross examination, Dr. Morris testified that if a dog was housed in the crates depicted in the May 10 photographs, "where they can't lift their head all the way up or they can't stretch out when they lay down, . . . it may cause problems in the future. . . . I would say it wouldn't be good for their overall health . . . [p]hysical and behavioral."

The jury convicted Petro as charged of four counts of animal cruelty. The court imposed a 24 month deferred sentence.[2]

On appeal, the superior court affirmed. This court granted Petro's motion for discretionary review.

ANALYSIS

Void for Vagueness

Petro contends SMC 9.25.081(F) violates due process and is void for vagueness because the terms "move about freely" and "injurious" are subjective and undefined terms that do not provide adequate notice of the conduct that is proscribed or are not sufficiently definite to prevent arbitrary enforcement.

SMC 9.25.081(F) provides:

[2] The court ordered Petro to forfeit all but three dogs and abide by the Animal Control requirements.

> It is unlawful for any person to:
> . . .
> F. Tether or confine any animal in such a manner or in such a place as to cause injury or pain not amounting to first degree animal cruelty defined in RCW 16.52.205, or to endanger an animal; or to keep an animal in quarters that are injurious to the animal due to inadequate protection from heat or cold, or that are of insufficient size to permit the animal to move about freely; . . .

We review the constitutionality of SMC 9.25.081(F) de novo. City of Spokane v. Neff, 152 Wn.2d 85, 88, 93 P.3d 158 (2004). A legislative enactment is presumed constitutional and we must "make every presumption in favor of constitutionality where the statute's purpose is to promote safety and welfare, and the statute bears a reasonable and substantial relationship to that purpose." State v. Glas, 147 Wn.2d 410, 422, 54 P.3d 147 (2002); City of Seattle v. Montana, 129 Wn.2d 583, 589, 919 P.2d 1218 (1996).

A statute is unconstitutionally void for vagueness if it does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). The party asserting a vagueness challenge bears the heavy burden of proving unconstitutionally beyond a reasonable doubt that the statute does not make plain the conduct that is proscribed. State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1993).

Determining whether a statute sufficiently defines an offense "does not demand impossible standards of specificity or absolute agreement." Douglass, 115 Wn.2d at

179. For a statute to be unconstitutional, its terms must be "'so loose and obscure that they cannot be clearly applied in any context.'" Douglass, 115 Wn.2d at 182 n.7 (quoting Basiardanes v. Galveston, 682 F.2d 1203, 1210 (5th Cir 1982)). Some vagueness is inherent in the use of language. Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 740, 818 P.2d 1062 (1991). The fact that a statutory term is not defined and requires a subjective evaluation does not automatically mean that the statute is unconstitutionally vague. Douglass, 115 Wn.2d at 180. In determining whether the statute gives fair warning of the proscribed conduct, we must give the language a "sensible, meaningful, and practical interpretation." Douglass, 115 Wn.2d at 180.

"A criminal statute need not set forth with absolute certainty every act or omission which is prohibited if the general provisions of the statute convey an understandable meaning to the average person. This is especially true where the subject matter does not admit of precision." City of Spokane v. Vaux, 83 Wn.2d 126, 130, 516 P.2d 209 (1973).

As to the second prong of the due process analysis, a legislative enactment provides adequate standards to protect against arbitrary enforcement unless the statute proscribes conduct by resorting to "'inherently subjective terms'" or invites an inordinate amount of police discretion. Douglass, 115 Wn.2d at 180. However, "[t]he mere fact that a person's conduct must be subjectively evaluated by a police officer" does not mean the statute is unconstitutional. State v. Maciolek, 101 Wn.2d 259, 267, 676 P.2d 996 (1984).

Where a vagueness challenge does not implicate the First Amendment, we

evaluate the statute as applied to the particular facts of the case and the party's conduct. Montana, 129 Wn.2d at 597. A party cannot challenge a statute on the grounds it is vague as applied to others, if the statute clearly applies to the party's conduct. Douglass, 115 Wn.2d at 182-83.

It is unlawful under SMC 9.25.081(F) "to keep an animal in quarters that are injurious to the animal due to . . . insufficient size to permit the animal to move about freely." Consistent with SMC 9.25.081(F), the court instructed the jury that to convict, the City had to prove beyond a reasonable doubt that (1) Petro "kept an animal in quarters" on or about the date of the charge; (2) "the quarters were injurious to the animal because they were of insufficient size to permit the animal to move about freely;" (3) Petro "acted knowingly;" and (4) "the acts occurred in the City of Seattle."

Petro does not contest that he had notice of the proscribed conduct. The undisputed evidence established that the animal control officers repeatedly told Petro that two of the crates that he used to house three of his dogs were undersized crates that prevented the dogs from moving about freely and violated the code. One dog was housed in a crate that was too small for the dog to fully stand up and Petro housed two other dogs in a crate designed for one dog. The evidence also established the dogs were housed in conditions that were detrimental to the physical and psychological well-being of the dogs by frequently keeping the dogs in the crates for 20 to 22 hours a day. We hold that the language of SMC 9.25.081(F) is not vague as applied to Petro's conduct.

The cases Petro relies on to argue that SMC 9.25.081(F) is unconstitutionally

vague are distinguishable. Myrick v. Board of Pierce County Comm'rs, 102 Wn.2d 698, 707, 687 P.2d 1152 (1984) was a facial challenge, not an as applied challenge. The question in Myrick was whether the code provision that required a masseuse to be "fully clothed, neat and clean," gave sufficient notice of the proscribed conduct. The court held that the uniform requirement was unconstitutionally vague on its face because the term "fully clothed" did not give fair warning of the type of clothes a masseuse would need to wear to comply with the code. Myrick, 102 Wn.2d 707-08.

In State v. Locklear, 105 Wn. App. 555, 20 P.3d 993 (2001), the defendant was convicted of a drive-by shooting. The statute prohibited firing a gun "'either from a motor vehicle or from the immediate area of a motor vehicle . . . .'" Locklear, 105 Wn. App. at 556. Because the defendant fired the gun two blocks away after getting out of the car, the court held that the statute was unconstitutionally vague as applied to the defendant. The court concluded that based on the facts of the case, a person of ordinary intelligence would have to guess as to the meaning of "immediate area." Locklear, 105 Wn. App. at 561.[3]

Neff was a facial challenge not an as applied challenge. The court held that an ordinance was unconstitutionally vague on its face because it allowed an investigating officer to consider whether a person was a "known prostitute," but contained no standards for making that determination. Neff, 152 Wn.2d at 91. Here, unlike in Neff, there is no dispute that the dogs in the two undersized crates could not "move about freely" and that housing the dogs in the crates for 20 to 22 hours a day was

[3] The court affirmed the Locklear decision on alternative grounds, concluding that it was unnecessary to reach the constitutional issue because the defendant was clearly not in the "immediate area" when he fired the gun. State v. Rodgers, 146 Wn.2d 55, 59, 61, 43 P.3d 1 (2002).

"injurious."

Equal Protection

Petro also argues that because he was denied the right to assert the affirmative defense of economic distress beyond his control, his convictions violated equal protection.[4] But the defense of economic distress is only available in a prosecution for animal cruelty in the second degree under RCW 16.52.207(2)(a). RCW 16.52.207(4) provides in pertinent part:

> In any prosecution of animal cruelty in the second decree under subsection (1) or (2)(a) of this section, it shall be an affirmative defense, if established by the defendant by a preponderance of the evidence, that the defendant's failure was due to economic distress beyond the defendant's control.

Where, as here, there are different elements for two different crimes, equal protection is not violated. State v. Presba, 131 Wn. App. 47, 54, 126 P.3d 1280 (2005); State v. Liewer, 65 Wn. App. 641, 644-45, 829 P.2d 236 (1992).

Sufficiency of the Evidence

In the alternative, Petro asserts insufficient evidence supports the animal cruelty convictions. Petro argues there is no evidence to show that keeping the three dogs in the two undersized crates would cause injury to the dogs. Petro also argues there is no evidence that the dogs were in the crates on two of the four days charged, April 24 and May 8.

We review challenges to the sufficiency of the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Salinas, 119

[4] U.S. Const. amend. XIV, § 1 and Washington State Constitution, art. I, § 12.

Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The trial court instructed the jury that "injurious" means "causing or tending to cause injury." Dr. Morris unequivocally testified that housing the dogs in undersized crates for extended periods of time was detrimental to a dog's psychological and physical well-being. The homeowner also testified that on the days that Petro did not take the dogs to Renton, the dogs were only out of the crates for a couple of hours in the morning and in the evening. Sufficient evidence supports the jury determination that housing the dogs in the undersizeded crates, frequently for 20 to 22 hours at a time, was "causing or tending to cause injury" to the dogs.

Circumstantial evidence also supports the determination that the dogs were in the crates in the trailer on April 24 and May 8. Officer Leahy testified that during the afternoon of April 24 and May 8, she saw the two dogs chained to the trailer and heard the other dogs barking inside the trailer. When Officer Leahy seized the dogs on May 10, the same two dogs were tethered to the trailer and the other dogs that were housed in the crates inside the trailer were barking. Based on the evidence at trial, a rational juror could conclude beyond a reasonable doubt that the dogs were housed inside crates in the trailer the afternoon of April 24 and May 8.

We affirm.

Schindler, C.J.

WE

Becker, J.

Grosse, J.

CONCUR: